

² *Hurlburt v. T-Mobile USA, Inc.*, No 1021535 WL (Kan. WCAB May 13, 2009).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The sole issue in this appeal is whether the claimant's demand for compensation comported with the statutory requirements of K.S.A. 44-512a. There is no dispute as to the underlying facts which led to the present appeal.

Claimant's demand for compensation stems from an earlier Order issued by the ALJ on February 13, 2009. That order directed respondent to pay temporary total disability (TTD) benefits commencing December 8, 2008, until such time as claimant reached maximum medical improvement or had been released and placed in an accommodated position. That same order directed respondent to pay \$500 in authorized medical allowance to claimant's attorney as well as \$308.20 in medical mileage. No appeal followed from that Order.

None of those payments were made to claimant as ordered and on February 19, 2009 a demand for payment was made. That demand was mailed certified mail to respondent's attorney.³ It was not, however, mailed by certified or registered mail to respondent or its carrier. Twenty days expired and on March 13, 2009 claimant filed a motion for penalties under K.S.A. 44-512a.

On April 1, 2009, a hearing on the motion for penalties was conducted. At that hearing, counsel for respondent and the insurer produced a \$500 check for the unauthorized medical allowance along with the explanation that the check had been inadvertently locked in counsel's safe. There was an additional check for TTD benefits for the sum of \$8,650.00 covering the period December 8, 2008 to April 5, 2009. There was no check for the outstanding mileage. In defense of his client's failure to pay, counsel explained that as to the TTD and mileage benefits his client was "disappointed"⁴ with the earlier order and the directive to pay, calling those benefits a "windfall"⁵. In fact, respondent and carrier's counsel blatantly admitted that he did not dispute the mileage at the earlier hearing⁶ but now his client was simply reluctant to pay as ordered.

³ There is no contention in this record that this demand lacks the requisite specificity. In fact, it demands precisely, to the penny, what the ALJ ordered on February 13, 2009. Although the ALJ's Order on Application for Penalties indicates at one point the demand was sent *registered mail* (p. 2), in another portion of the Order it indicates the demand was sent *certified mail* (p. 3) these methods of mailing are not synonymous although the statute at issue allows for either method to be used.

⁴ M.H. Trans. (Apr. 1, 2009) at 9.

⁵ *Id.* at 9.

⁶ *Id.* at 8.

All those excuses aside, respondent and its carrier argued to the ALJ that the demand for payment was defective because claimant failed to serve the notice on both parties in the requisite manner, citing *Hurlburt*.⁷

The ALJ was obviously less than persuaded by respondent and insurance carrier's excuses or the reference to *Hurlburt*, a recent Appeals Board case dealing with K.S.A. 44-512a. She concluded that-

This case is distinguishable from the above-cited Board case. First, [c]laimant's demand letter was served on [r]espondent's attorney by certified mail. Second, [c]laimant's demand was specific as to the disability compensation being demanded. Third, the Application for Penalties reflected the demands made in the demand letter. However, the insurance carrier or employer were not served with the demand letter as set out in K.S.A. 44-512a.

However, it is found that [c]laimant's demand letter was served on [r]espondent's attorney who is the authorized agent for employer and insurance carrier and thus service of the demand letter was not deficient under the provisions of K.S.A. 44-512a.⁸

The ALJ also concluded that respondent and its carrier's protestations as to the underlying liability for benefits were baseless. She noted that "dissatisfaction" with an Order to pay benefits is not appropriate justification for not complying with a Court Order.⁹ Likewise, misplacing a check and thereby failing to tender it to claimant's counsel, is not, under these circumstances, a viable excuse. Finally, she stated that "[i]f respondent wished to dispute the medical mileage then their concerns should have been presented at the preliminary hearing."¹⁰

The ALJ then assessed a penalty against respondent and the carrier for the failure to pay. As noted at the outset of this Order respondent and the carrier do not dispute the amount of the penalty. Rather, the only defense stems from the statutory requisites of the demand statute.

The Act entitles workers to penalties when compensation that has been awarded is not paid when due. The Act provides:

⁷ *Hurlburt v. T-Mobile USA, Inc.*, No 1021535 ____ WL ____ (Kan. WCAB May 13, 2009).

⁸ ALJ Order (Apr. 1, 2009) at 3. Again, earlier in the ALJ's Order she indicates the demand was sent registered mail. The record contains a copy of the receipt which shows the demand was sent via certified mail.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person . . . entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability . . . compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.¹¹

Both parties seem to agree that the demand made by claimant upon respondent was sufficiently specific and that it was mailed by certified mail *to respondent's counsel*. It was not mailed, by regular, certified or registered mail, to the employer or its carrier.

This issue, among some related issues, was explored in *Hurlburt*. In that case, the demand at issue lacked a substantial degree of specificity. Moreover, the demand itself was not sent in the method proscribed by the statute and it was not sent to either the respondent or its insurance carrier. Thus, the Board concluded that no penalty was appropriate as the claimant's demand was statutorily defective.

Although the ALJ attempted to distinguish *Hurlburt* from the instant set of facts, the Board is not persuaded. While it is true that an attorney can, in certain instances, stand in the shoes of the client for purposes of notice, the ALJ's analysis makes a portion of the language of the statute at issue meaningless. The statute requires the demand for payment to be made personally ***on the employer or insurance carrier and its attorney of record***. This requirement is clear on its face. In every instance the attorney must receive a copy of the demand (and receive it in the appropriate manner required by the statute). In addition to the service upon the attorney, the claimant *must* send the demand to *either* the employer or the insurance carrier, again in the appropriate manner required by the statute. If the additional notice to the employer or the carrier is not completed, the statutory requisites are not met. If notice to the attorney was sufficient notice to the attorney's clients, then the statute would not require the additional sending of notices to those individuals or entities. Why this additional notice to the employer or its insurance carrier is required after an attorney has entered his appearance for those parties is unclear. Nevertheless, that is what the Legislature mandated.

Claimant failed to serve his demand upon the appropriate parties as required by the statute. As such, the Board finds that the ALJ's Order assessing penalties against respondent must be reversed and set aside.

¹¹ K.S.A. 44-512a.

To be clear, the Board finds respondent's and insurance carrier's conduct in this matter reprehensible and a flagrant violation of the Court's Order. The ALJ was accurate in her assessment with respect to respondent's baseless excuses for its nonpayment of the benefits at issue. In fact, this conduct would seem to be the very sort of conduct the fraud and abuse statutes were intended to address.¹² But the Board is constrained to follow the law and the statutory requirements for purposes of assessing penalties under K.S.A. 44-512a.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Rebecca Sanders dated April 1, 2009, is reversed and set aside.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

¹² K.S.A. 44-5,120.